

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

THE CITY OF HUNTINGTON,
Plaintiff,

v.

AMERISOUCEBERGEN DRUG CORPORATION, *et*
al.,
Defendants.

Civil Action No. 3:17-01362

CABELL COUNTY COMMISSION,
Plaintiff,

v.

AMERISOUCEBERGEN DRUG CORPORATION, *et*
al.,
Defendants.

**PLAINTIFFS' MOTION FOR LEAVE TO FILE SURREPLY IN OPPOSITION TO
DEFENDANTS' MOTION TO EXCLUDE CERTAIN EXPERT TESTIMONY OF
KATHERINE KEYES**

December 1, 2020

Plaintiffs respectfully move this Court for leave to file the attached succinct *Proposed Surreply in Opposition to Defendants' Motion to Exclude Certain Expert Testimony of Katherine Keyes*. Ex. 1. See S.D.W. Va. L.R. 7.1(a)(7); Order, Aug. 28, 2020, at 5, Dkt. 898.

There is good cause to grant Plaintiffs' motion. Defendants' reply,¹ Dkt. 1172, stakes out “new areas of dispute”—some that arise from the supplemental deposition, others that Defendants could have raised in their opening brief but did not—to which a short surreply is appropriate. *Lewis v. Charter Commc'ns VI LLC*, No. Civ. A. 5:01-1261, 2005 WL 2094752, at *1 n.2 (S.D.W. Va. Aug. 26, 2005) (Faber, C.J.). Compare *FDIC v. Cashion*, 720 F.3d 169, 176 (4th Cir. 2013) (not abuse of discretion to strike unauthorized surreply where reply raised no new argument or evidence).

These new issues include whether Dr. Keyes inappropriately applied CDC guidelines concerning multi-drug overdoses; whether the deposition testimony of West Virginia Chief Medical Officer, Alan Mock, M.D., contradicts Dr. Keyes' testimony; whether the population-stability assumption of so-called multiplier methods permits a reliable estimation of the number of opioid use disorder sufferers in Cabell County;² whether a recently published estimate of the number of people who inject drugs in Cabell County undermines Dr. Keyes' estimate of the number of residents of Cabell/Huntington with OUD; whether Dr. Keyes changed her

¹ Before Defendants moved to exclude, Dr. Keyes submitted two sets of corrections to her original report. When Defendants filed their motion, Dkt. 1056 (“Br. Supp.”), they argued they had been unfairly prejudiced by these corrections. Br. Supp. 10. Before filing their brief in opposition, Plaintiffs offered and Defendants accepted the opportunity to take a supplemental deposition of Dr. Keyes. See Dkt. 1117 (notice of deposition). Plaintiffs then filed their opposition. Dkt. 1160 (“Br. Opp.”).

² In their opening brief, Defendants argued about the relevance of stable mortality rates for multiplier methods. Br. Supp. 16. In response, Plaintiffs pointed out that the authority on which Defendants relied referred to population stability, not mortality rate stability. Br. Opp. 19. Defendants now make the arguments they would have made in their opening brief but for their own misreading.

methodology with respect to her assumptions concerning suppressed data; and whether Dr. Keyes's supplemental deposition testimony cured any late disclosures.

Plaintiffs note that Defendants' arguments on each of these issues except the last could have been raised in their opening brief but were not. If the Court denies Plaintiffs leave to file their *Proposed Surreply*, Plaintiffs respectfully move the Court in the alternative to strike Defendants' reply to this extent. See *Autotech Techs. Ltd. P'ship v. Automationdirect.com, Inc.*, 249 F.R.D. 530, 536 (N.D. Ill. 2008) ("Reply briefs are for replying, not for raising new arguments or arguments that could have been advanced in the opening brief.").

For these reasons, the Court should allow Plaintiffs leave to file their attached *Proposed Surreply*.

Dated: December 1, 2020

THE CITY OF HUNTINGTON

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2020, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court’s electronic filing system. Parties may access this filing through the Court’s system.

/s/ Anthony J. Majestro